

# ASYLUM, WITHHOLDING OF REMOVAL, AND CONVENTION AGAINST TORTURE



*October 2018*

# Learning Objectives:

1. Explain the theory and practice of asylum law
2. Understand different BOP and know the basic elements of asylum and related relief
3. Be able to identify what the relevant issues are in an asylum, withholding of removal, or CAT case
4. Recognize when an applicant is barred from relief



# Powerpoint Sections:

1. Background and Sources of Law
2. BOP/Basic Elements of Asylum and Related Relief
3. Bars to Relief
4. “Hot Topics” (time permitting)



# BACKGROUND AND SOURCES OF LAW



## Sources:

- Refugee Act of 1980
- Federal Circuit Court and U.S. Supreme Court decisions
- BIA precedent decisions
- Regulations at 8 C.F.R. §§ 1208.1 to 1208.31
- UNHCR Handbook

# What is a “refugee”?



INA § 101(a)(42)(A) defines refugee as any person who is:

- Outside the country of such person's nationality or where she last habitually resided
- Unable/unwilling to return to and unable/unwilling to avail herself of that country's protection
- Because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

# Coercive Population Control Amendments to “refugee”

INA § 101(a)(42)(B) (added in 1996) amended definition to include:

- person who has been forced to abort a pregnancy or undergo involuntary sterilization OR
- who has been persecuted for failure/ refusal to undergo such a procedure OR
- for “other resistance” to coercive population control program
- and then the person shall be deemed to have been persecuted on account of political opinion
- Supersedes ***Matter of Chang***, 20 I&N Dec. 38 (BIA 1989)



# Coercive Population Control Amendments to “refugee”

Case law clarification of who is eligible:

- ◎ ***Matter of J-S-***, 24 I&N Dec. 520 (AG 2008) – AG held that a husband cannot stand in shoes of his spouse for a forced sterilization claim.

# Hypo

R had an intrauterine device (“IUD”) inserted pursuant to the CPC policy after the birth of her first child. When Chinese officials denied her request to have the device removed, R hired a private doctor to remove the IUD. It was discovered during a government-mandated gynecological examination that the IUD was missing. R was detained for 3 days and she eventually agreed to the insertion of a second IUD.

**Is this forced sterilization (per se ground for granting asylum)?**

# Hypo

## Insertion of IUD = sterilization?

**Matter of M-F-W- & L-G-, 24 I&N Dec. 633 (BIA 2008)**

- No. IUD insertion prevents conception, but is not a permanent procedure.



# Hypo

Five years later, same R attempted to leave China but was caught in Hong Kong. She was detained for 4 months and fined for leaving China illegally and for missing required gynecological examinations.

**Is R eligible for asylum based on these facts?**

# Hypo

***Matter of M-F-W- & L-G-***, 24 I&N Dec. 633 (BIA 2008)

R must show:

1. Resistance to family planning policy;
2. Past persecution (or WFF); and
3. Persecution was or would be *because of* R's resistance to family planning policy.

# NEXUS Amendment

- INA § 208(b)(1)(B)(i) (added in 2005) amended nexus requirement for asylum to require that:
- (1) a protected ground (race, religion, nationality, MPSG, or political opinion) must be “at least one central reason” for fear of persecution



# Hypo

R, a native of A, fled to country Z as a child but returned home roughly 20 years later to be with his ailing mother. She thereafter amended her will, causing R to inherit land upon her death. The other survivors were enraged. R's uncle, who was otherwise friendly with R and with whom R lived while visiting the past 3 years, was particularly upset. "You traitor," his uncle warned, "return to country Z or I will kill you!" R refused to do so. A few days later, R was attacked by his uncle and shot twice. The shooting occurred outside a diner serving cuisine exclusive to country Z.

**R claims he was persecuted "on account of":**

- Nationality (imputed national of country Z)

# Hypo

- REAL ID Act: protected ground must be “at least one central” reason

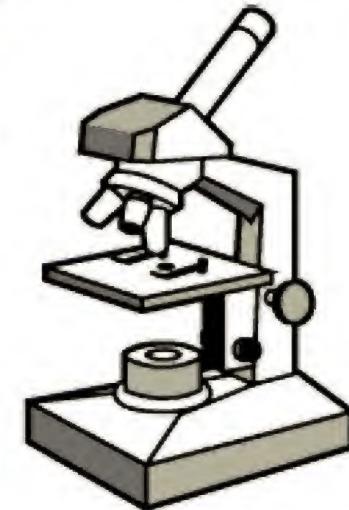
***Matter of J-B-N- & S-M-***, 24 I&N Dec. 208 (BIA 2007):

- The harm-triggering event → Inheritance of land
- “Traitor” & location of shooting – tangential factors
  - Uncle was friendly w/ R and allowed R to live w/ him previously
  - R’s imputed nationality of country Z not a problem before—is it really now?

## Nexus—Circuit Court Guidance

To qualify for **asylum** an Applicant has the burden to show that one of the five protected grounds was or will be “**at least one central reason**” for the persecution he or she faces. Section 208(b)(1)(B)(i) of the Act.

The Board has explicitly applied the “**one central reason**” language to an applicant requesting **withholding of removal under the Act**. *Matter of C-T-L-*, 25 I&N Dec. 34 (BIA 2010).



However, the **9<sup>th</sup> Circuit** recently declined to give *Matter of C-T-L-Chevron* deference and stated that applicants requesting **withholding of removal under the Act need only demonstrate that one of the five protected grounds was or will be “a reason” for the persecution**. See *Barajas-Romero v. Lynch*, 846 F.3d 351 (9th Cir. 2017).

# CREDIBILITY Amendments

- INA § 208(b)(1)(B)(iii) (added in 2005) amended credibility standard to require that:
  - the IJ consider the “totality of the circumstances”
  - Based on a number of factors



# CORROBORATION Amendments

- ◎ INA § 208(b)(1)(B)(ii) (added in 2005) amended corroboration standard to require that:
  - ◎ Corroboration – IJ may request that corroborations must be provided or its absence reasonably explained



# Credibility Hypo

R appeared nervous during the proceedings. The IJ observed that she fidgeted in her seat while testifying and generally did not look directly at the questioner. At other times, R seemed impatient with the questions being asked of her.

**Does R's demeanor alone support an ACF?**



## Credibility Hypo (cont.)

In addition to appearing nervous, R's testimony also contained one inconsistency. R initially testified that she graduated from high school in August 1989, but during cross-examination she stated that she graduated in *June* 1989.

**Does this inconsistency coupled with demeanor support an ACF?**



## Credibility Hypo (cont.)

In addition to misstating her graduation month, R provided inconsistent testimony regarding her arrival in the United States. She first testified that she arrived in the United States in 1991; however, she later stated that she arrived in the United States in 2006. Assume that R's date of arrival was unrelated to her fear that she would be harmed in her home country.

**Relevant to the credibility determination?**

# Credibility Hypo (cont.)

R's claim is that she will be persecuted in Country J on account of her political opinion. She originally stated that she had been arrested during a rally and detained for 12 weeks without access to family or an attorney. During cross-examination, she admitted that she had not been arrested and she was never placed into detention.

**Is there now enough to support an IJ's ACF?**



# Corroboration Hypo

R fears that he will be harmed in Country X on account of his race. He testified, however, that members of his race account for almost 98 percent of Country X's population. They are well-represented in Country X's Government, military, and civil society. R also acknowledged that the president of Country X is a member of his race. The IJ found R's fear of harm to be slightly implausible, but there was no sufficient basis for an adverse credibility finding.

**Permissible to require corroboration of R's fear?**

## Corroboration Hypo #2

Assume R is found credible by the IJ.

R testifies briefly that he fears that he will be persecuted in Country Z on account of his religion. His testimony is consistent, with few or no discrepancies, but it is also sparse and lacking in detail.

**Is it permissible to require corroboration of R's fear?**



# Corroboration – Circuit Court Split

- 3rd and 9th Circuits require that IJ gives notice that corroboration is required and opportunity to obtain it or explain why not available.
- 2d, 6th, and 7th Circuits do not require that IJ provide notice or opportunity to obtain/explain.
- BIA follows 2d and 7th Circuits  
***Matter of L-A-C-***, 26 I&N Dec. 516 (BIA 2015).



# Standard of Review – Board of Immigration Appeals

## 8 C.F.R. § 1003.1(d)(3)

- Board reviews facts determined by an IJ for **clear error**
- Board reviews **de novo** questions of law, discretion, judgment, and all other issues in appeals from IJ decisions

“A finding is ‘**clearly erroneous**’ when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

**De novo** means “anew.” BLACK’S LAW DICTIONARY (10th ed. 2014).

# Examples: Standard of Review

Clear Error	De Novo
Credibility determination	Harm = “persecution”?
Predictive findings of what may occur in the future	Objectively reasonable fear of future persecution
Applicant’s residence in another country	Firmly resettled?
Nature of applicant’s criminal activities, family ties, employment history, etc.	Discretion
Intent of applicant in making a false statement	Materiality of representation

# Background Summary

- 1980 Congress codified refugee definition from Convention/Protocol
- 1996 CPC amendments—forced abortion/sterilization
- 2005 REAL ID amendments—nexus, cred., corrob.
- Apply statute, regulations, and precedents of Supreme Ct., relevant circuit court, and BIA



## BURDEN OF PROOF / BASIC ELEMENTS



**burden  
of proof**

## Burdens/Elements – Asylum

- Asylum standard more generous than withholding standard
- *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987) (noting that an alien need only show that her removal would create a “reasonable possibility” — as low as a 10% chance — of persecution).



## Burdens/Elements – Asylum

- R has the burden to show PP or WFF
- Oao a protected ground (1 of 5)
- Can be satisfied by R's testimony alone, if credible -- 8  
C.F.R. § 1208.13(a)
- IJ must make specific finding as to PP
- If R shows PP, then presumption of WFF on basis of original claim applies
- If R fears harm unrelated to PP then R still has burden

## SIDEBAR #1: What is “persecution”?

**Severe harm or suffering inflicted to punish for possessing a belief or characteristic a persecutor seeks to overcome—*Matter of Acosta*, 19 I&N Dec. 211, 223 (BIA 1985)**



**Non-physical harm may count** – e.g., deliberate imposition of **severe** economic disadvantage or deprivation of liberty, food, housing, employment, education, etc. *Matter of T-Z-*, 24 I&N Dec. 163 (BIA 2007); *cf. He v. Holder*, 749 F.3d 792 (9th Cir. 2014)

## SIDEBAR #1 cont'd: What is "persecution"?

In addition, some courts have found the following to rise to the level of persecution:

- › Forced repression of identity or beliefs
- › Harm to family members
- › Lack of health care, including where applicant has mental illness
  - Note—judges should consider the age of the applicant at the time of the harm to determine emotional/psychological effect

## SIDEBAR #1 cont'd: What is "persecution"?

- ◎ Actual harm required to establish past persecution—threats of harm, brief period of detention, usually will not suffice



- ◎ Remember—incidents, in the aggregate, can rise to level of persecution, especially if escalating in nature

## SIDE BAR #1 cont'd: What is not “persecution”?

Unfulfilled threats alone generally ≠ PP—but can be indicative of future persecution

**Small number of cases, threats have been found to = PP**

- > immediate and menacing nature to cause significant actual suffering or harm
- > imminent or concrete,
- > accompanied by some additional evidence of harm to applicant or others, (e.g., family members being beaten/murdered)

## SIDE BAR #1 cont'd: What is not "persecution"?

**Discrimination**—*Fisher v. INS*, 79 F.3d 955, 961-62 (9th Cir. 1996)

**General conditions of violence**—*Martinez-Romero v. INS*, 692 F.2d 595 (9th Cir. 1982)

**Military recruitment**—*Matter of Vigil*, 19 I&N Dec.572 (BIA 1988)



## SIDE BAR #2 -- Particular Social Group

**3 elements—(1) immutability; (2) particularity; (3) social distinction**

**Immutability—*Matter of Acosta*, 19 I&N Dec. 211, 233-34 (BIA 1985)**

**Group of persons who share common, immutable characteristic  
(innate or shared past experience)**

**Cannot change or should not be required to change**



## SIDEBAR #2 cont'd: Particular Social Group

### Particularity—

Group boundaries must be ascertainable

Group cannot be **vague, uncertain, or subjective**

“Affluent Guatemalans”—societal views vary on who is “affluent”  
(too subjective)

- > ***Matter of A-M-E- & J-G-U-***, 24 I&N Dec. 69 (BIA 2007)



## SIDE BAR #2 cont'd: Particular Social Group

### Social Distinction—

Same as social visibility, just a new name

On-sight visibility not required (3d & 7th)

**Key→** whether group is perceived as meaningfully distinct segment of society

Note—PSG cannot be defined merely by fact that the members subjected to harm

See **Matter of W-G-R-**, 26 I&N Dec. 208 (BIA 2014); **Matter of M-E-V-G-**, 26 I&N Dec. 227 (BIA 2014); see also *Matter of A-B-*, 27 316 (A.G. 2018)

## SIDE BAR #2 cont'd : Particular Social Group Examples

- Homosexuals
- Subclan in Somalia
- Young women opposed to FGM
- Filipinos of mixed Filipino-Chinese ancestry
- Family



# Hypo - Nexus

- ❖ Native of Mexico, voluntarily returned in 2011. Father rejected gang request to sell drugs
- ❖ After return, R left home when heard gunshots; saw car drive by.
- ❖ A week later, R was approached by same car. Gang asked him to sell drugs. R declined.



# Hypo – Nexus

- ❖ R again approached by same car. Masked men tried to kidnap R
- ❖ Thereafter, R crossed the border into the U.S. Father continued to run store/pays rent to gang
- ❖ R claims PSG of father's family members



# Hypo – Nexus

- ❖ IJ found gang targeted R b/c of interest in selling drugs at store
- ❖ IJ noted P's motive related to store ownership/no nexus



# Hypo – Nexus

***Matter of L-E-A-*, 27 I&N Dec. 40 (BIA 2017)**

- ❖ Family as a PSG – focus is on nexus
- ❖ Family membership must be at least one central reason for claimed harm



When applying *Matter of L-E-A-*, keep in mind:

--*Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018)

--Check your Circuit Ct case law!



## SIDE BAR #2 cont'd: What groups are not a PSG? Examples:

"Non-criminal confidential drug informants"—not socially distinct enough

Deportees is too broad—not socially distinct or particular

Those who resist/reject gang recruitment based on personal, moral, religious opp. to gang's values and activities—not particular enough, nor socially distinct

Those perceived to be wealthy because they worked in the U.S.—fails both prongs

People subjected to private violence, such as domestic violence victims



## RECALL--Burdens/Elements – Asylum

- R has the burden to show PP or WFF
- Oao a protected ground (1 of 5)
- Can be satisfied by R's testimony alone, if credible -- 8 C.F.R. § 1208.13(a)
- IJ must make specific finding as to PP
- If R shows PP, then presumption of WFF on basis of original claim applies
- If R fears harm unrelated to PP then R still has burden

# Burdens/Elements – Asylum

To rebut WFF, DHS bears burden of proving by preponderance of evidence:

- **fundamental change in circumstances** in R's country  
*or*
- R able to avoid future persecution thru reasonable **internal relocation**



# Internal Relocation Analysis

R must be **able** to relocate (substantially better conditions than those that would give rise to WFF)

*And*



Relocation **must be reasonable** under circumstances (factors at 8 C.F.R. § 1208.13(b)(3)).

- > ***Matter of M-Z-M-R-***, 26 I&N Dec. 28 (BIA 2012)

# Burdens/Elements – Asylum

If DHS rebuts presumption of WFF, humanitarian asylum may still be available if R shows one of two things:

(1) “Compelling reasons” arising out of **severity of past persecution**

- > Harm suffered must be “atrocious”
- > Known as “Chen grant of asylum” – *Matter of Chen*, 20 I&N Dec. 16 (BIA 1989)



# Burdens/Elements – Asylum

Chen grant of humanitarian asylum – Compare two cases involving aliens mistreated by the communist secret police in Afghanistan while the Mujahidin were trying to overthrow the government:

- **Matter of N-M-A-**, 22 I&N Dec. 312 (BIA 1998)) – R suffered one-month detention, physical beatings w/ no long-term injuries, and disappearance and likely death of father – found insufficient
- **Matter of B-**, 21 I&N Dec. 66 (BIA 1995) – R suffered one-year detention, deplorable/tortuous conditions, and long-term injuries – sufficiently severe/atrocious

# Burdens/Elements – Asylum

Humanitarian asylum is also available if the alien shows:

- (2) “Reasonable possibility” of **other serious harm** (need not relate to protected ground—no nexus required)
  - > Created by regulation in 2000
  - > Requires only a “reasonable possibility” of serious harm -- must be at least as severe as persecution; need not relate to a protected ground (i.e., no nexus required)
  - > Examples of other serious harm could be extreme economic deprivation, medical or physical harm, civil strife, etc.

# Hypo

R came to the U.S. after a series of attacks in his home country. Over a period of 3 years, he was physically beaten on 6 separate occasions (causing minor yet painful injuries) and arrested and detained for a total of 10 days. He also received numerous death threats, which ID'd him by name, and his home was ransacked and torched.

R was a high-profile, pro-democracy advocate, and DHS stipulates that these events were an attempt by the gov't to silence his dissent.

**What result?**

# Hypo

## Facts = PP?

- ◎ Cumulative approach
- ◎ Beatings not life threatening but still painful (and numerous)
- ◎ Relatively long detention
- ◎ Death threats
- ◎ House ransacked/torched

# Hypo

Assume PP established.

With 8 years having passed since R fled his home country, reports indicate that a new regime took control shortly after he left. Laws have since been enacted to broaden speech rights in the country. Members of R's pro-democracy group now operate out of a storefront in the capital and demonstrate at numerous government functions, including the president's recent re-election campaign, without incident. Other dissenters relate similar experiences.

**What result?**

# Hypo

## Presumption rebutted?

- Burden: DHS must show CCC by POE
- Regime change alone not sufficient . . .
- **BUT—**
  - Length in time (former regime ousted nearly 8 years ago)
  - Laws enacted to protect free speech
  - Similarly situated persons not harmed

# Hypo

Assume presumption rebutted.

Despite the country's advances on political matters, religious hostilities are rampant. R is not aligned with the warring factions, but his ethnic group, an extreme minority in the country, is geographically isolated to a region located at the heart of the feud. Albeit unintentionally, members of R's ethnic group have lost their homes and jobs, been injured, and even died as a result.

R was recently diagnosed with a life-threatening disease. The condition is treatable with medication, but doctors and HR groups refuse to travel to the war-torn region.

**What result?**

# Hypo

## “Other serious harm”

- ◎ Burden (on R): Reasonable probability of “other serious harm”
- ◎ **Factors—*Matter of L-S-***
  - ◎ Major strife in country
  - ◎ Severe economic deprivation to members of ethnic group from war-torn region
  - ◎ Physical/psychological harm from hostilities
  - ◎ Lack of access to life-saving medication

# Burdens/Elements – Asylum

## Proving a WFF:

- ◎ **Subjective** element: “Genuine apprehension or awareness of danger . . .” *Matter of Acosta*, 19 I&N Dec. 211, 221 (BIA 1985).



# Burdens/Elements – Asylum

## Proving a WFF:

- ◎ **Objective** element: Reasonable person standard—***Matter of Mogharrabi***, 19 I&N Dec. 439 (BIA 1987)





# Hypo #1

R is a native of El Salvador who held various positions in a cooperative organization of taxi drivers. He testified that members of the organization were threatened and assaulted by anti-government guerrillas for refusing to comply with work-stoppage requests. Some members were killed by unknown assailants. R received threatening notes and, on one occasion, he was beaten by men who took his cab. However, since the time that he left El Salvador, the guerrillas' strength has diminished significantly.

**Well-founded fear?**



## Hypo #2

R is an Iranian native who participated in anti-regime demonstrations while in the U.S. He also had an altercation with an Iranian official at an embassy in the U.S. During the encounter, R was threatened and placed at gunpoint. He claims that he is now known to Iranian officials and, as a result, he has good reason to fear persecution. It was not disputed that opponents of the regime in Iran are often persecuted.



**Well-founded fear?**

# Proving a WFF



- “**Pattern or practice**”—  
8.C.F.R. § 1208.13(b)(2)(iii)(A); *Bromfield v. Mukasey*, 543 F.3d 1071 (9th Cir. 2008) (finding a pattern or practice of persecuting gay men in Jamaica)
- “**Disfavored group**” (9th Circuit only)—  
*Wakkary v. Holder*, 558 F.3d 1049 (9th Cir. 2009); *Sael v. Ashcroft*, 386 F.3d 922 (9th Cir. 2004)

# Proving a WFF

- Internal relocation consideration

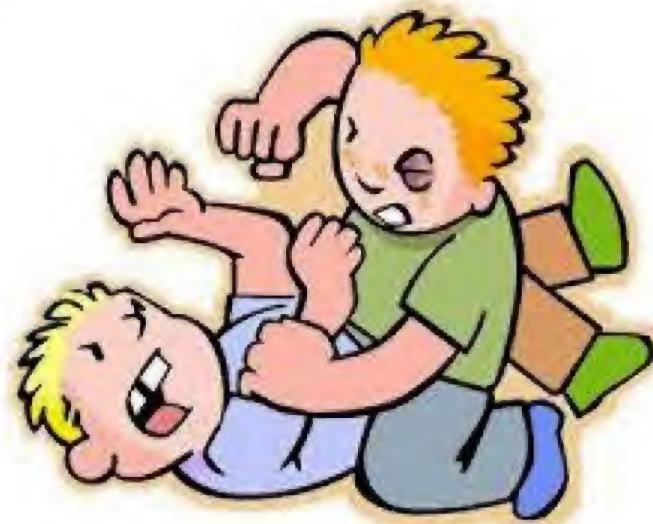
8 C.F.R. § 1208.13(b)(2)(ii), (b)(3)(i)



- No WFF if the respondent can avoid persecution by internally relocating and it would be reasonable to expect him or her to do so
- If no past persecution, burden is on the respondent
  - Unless the persecutor is the government or government-sponsored
- Example: *Ritonga v. Holder*, 633 F.3d 971, 977-78 (10th Cir. 2011) (affirming the Board's determination that the applicant could reasonably relocate)

# Unable or Unwilling to Control

- ❖ The term “persecution” applies not only to harm inflicted by country’s govt., but also to harm caused by “persons or an organization that the government [is] **unable or unwilling to control.**”
- ❖ ***Matter of Acosta,***  
19 I&N Dec . 211, 222 (BIA 1985)



# Common Examples of 3<sup>rd</sup> parties who inflict harm:

- ❖ Gangs
- ❖ Common criminals
- ❖ Militias or other non-regular armed forces
- ❖ Guerrillas or other rebel groups
- ❖ Violent religious or sectarian organizations
- ❖ Particularly powerful individuals

# “Unable and unwilling” defined?

*Urbina-Dore v. Holder*, 735 F.3d 952 (7th Cir. 2013)

“The Board has used the ‘unwilling or unable to control’ formula since 1964 yet has never attempted to quantify just how far a nation may depart from perfect law enforcement without being deemed complicit in private crimes.”



# Circuit Court Guidance

Some decisions focus on government complicity with or condonation of private acts.

e.g., ***Barsoum v. Holder***, 617 F.3d 73 (1st Cir. 2010) (“The state must . . . be implicated, whether by participation or acquiescence, for harm to amount to persecution.”)



# Circuit Court Guidance

In other cases, evidence of widespread corruption or unwillingness to prosecute may be sufficient.

e.g., *Fiadjo v. Att'y Gen. of the U.S.*, 411 F.3d 135, 160-63 (3d Cir. 2005) (discussing evidence of police “brutality and corruption” and the government’s “refusal to prosecute sensitive crime[s]”).



# Burdens/Elements – Asylum

Asylum is Discretionary (unlike Withholding of Removal)

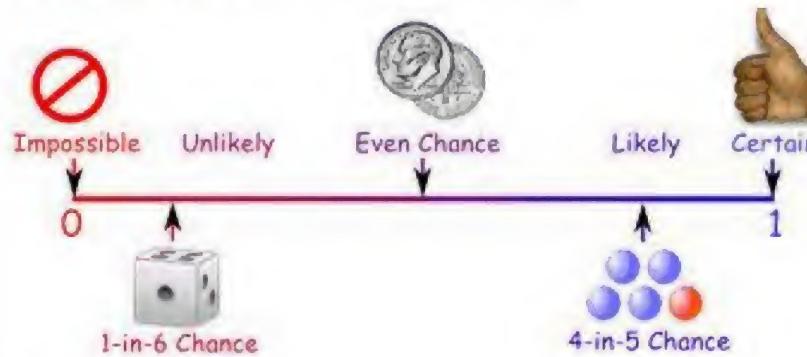
- *Junming Li v. Holder*, 656 F.3d 898 (9th Cir. 2011)
- R feared persecution due to religious practice of Falun Gong. IJ denied asylum as a matter of discretion: alien's manner of entry into U.S. – being concealed in metal box which was welded to the bottom of a car and driven across the border in the desert heat – was so dangerous that to grant asylum would encourage others to risk their lives. BIA affirmed stressing that R had been aware he could simply walk into the U.S. and request asylum but chose more dangerous approach to avoid detection.
- 9th Cir. held BIA did not abuse its discretion.



# Burdens/Elements—Withholding

- ◎ Mandatory Relief
- ◎ Clear probability standard—

***INS v. Stevic*, 467 U.S. 407 (1984)** – “more likely than not” = greater than 50% chance



- ◎ But “past persecution” still creates presumption of future threat to “life or freedom” -- 8 C.F.R. § 1208.16(b)(1)(i)
- ◎ Mandatory Asylum Reconsideration if WH granted – 1208.16(e)

# Burdens/Elements – CAT Withholding and Deferral

General standard: Applicant has burden to show “**more likely than not**” would be tortured if removed to proposed country of removal. 8 C.F.R. § 1208.16(c)(2).

However, 7th Cir. has announced its own standard: **substantial risk** of torture

- *Rodriguez-Molinero v. Lynch*, 808 F.3d 1134, 1135-36 (7th Cir. 2015)
- *Gutierrez v. Lynch*, 834 F.3d 800, 804 (7th Cir. 2016)

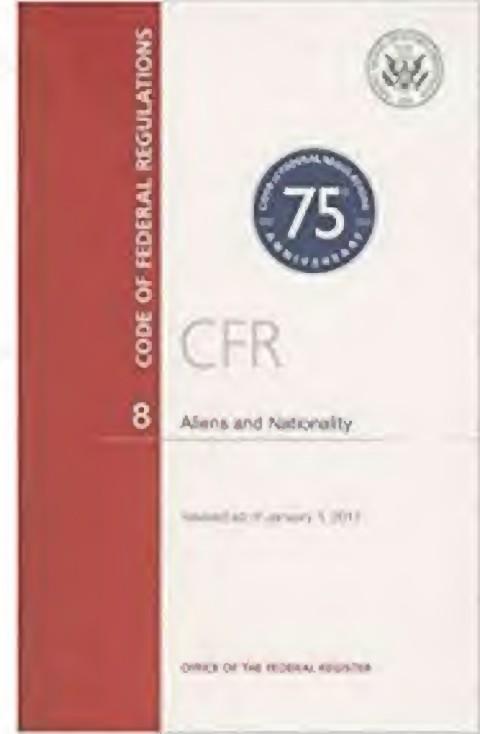


# Convention Against Torture- Withholding and Deferral

## Torture defined:

- Causes severe physical/mental pain
- Intentionally inflicted
- For proscribed purpose
- By, or at instigation of, or with consent/acquiescence of public official
- Custody/physical control of victim
- Does not arise from lawful sanctions

8 C.F.R. § 1208.18(a)(1)



# Convention Against Torture- Withholding and Deferral



**Inadequate prison conditions** not tantamount to torture

***Matter of J-E-***, 23 I&N Dec. 291 (BIA 2002)

**Inadequate medical care – must be intentional** (need to look at case-by-case)

***Pierre v. Att'y Gen. of U.S.***, 528 F.3d 180 (3d Cir. 2008)—  
inadequate medical care at Haitian prison not enough

# HYPOTHETICAL

- (1) Respondent, born in 1968, is a native and citizen of Mexico
- (2) Respondent becomes an LPR in June 1990—he is 22YO
- (3) Shortly thereafter he is diagnosed with bipolar disorder
  - a. Respondent typically takes 3 forms of medication for his bipolar disorder
  - b. In 1996, while off his medication, Respondent robbed a man while brandishing a screwdriver, and was charged with second degree robbery in violation of CPC § 211.
  - c. In 1997, Respondent pled guilty to the crime, and was sentenced to 2 years in prison

**RELIEF REQUESTED:** Withholding of removal under the Act and CAT Protection

## **RESPONDENT'S ARGUMENT:**

- (1) If removed he would be unable to afford medication;
- (2) Without medication his bipolar disorder would “take over”;
- (3) Respondent was then likely to end up confined to a MX mental institution;
- (4) Where conditions are deplorable.

# HYPOTHETICAL

## EVIDENCE IN YOUR RECORD

- (1) Transcript from a 20/20 TV program entitled “The Abandoned Ones” reporting squalor conditions—urine on the floor, tap water running sporadically, no soap or towels, patients consistently tied to their beds sometimes resulting in amputations
- (2) Transcript of NPR interview with a doctor indicating that no judicial review exists when a patient is involuntarily committed to a MX mental institution, and that once admitted, the patient becomes a ward of the hospital
- (3) Credible testimony of Respondent

IS CAT WARRANTED—WHAT DO YOU THINK?





## HYPOTHETICAL

### *Villegas v. Mukasey, 523 F.3d 984 (9th Cir. 2008)*

HOLDING: “[P]etitioner must show that severe pain or suffering was specifically intended—that is, that the actor intend[ed] the actual consequences of his conduct...” *Id.* at 989 (agreeing with *Matter of J-E*, 23 I&N Dec. 291 (BIA 2002) (en banc)).

#### APPLICATION

- (1) Although deplorable, “nothing indicate[d] that Mexican officials... **created** these conditions for the **specific purpose** of inflicting suffering upon the patients.”
- (2) The Mexican Government was also “taking steps to improve conditions,” and “**evidence of a desire to improve** confirms the conclusion that...the conditions in the Mexican mental health system exist not out of a deliberate intent to inflict harm...”

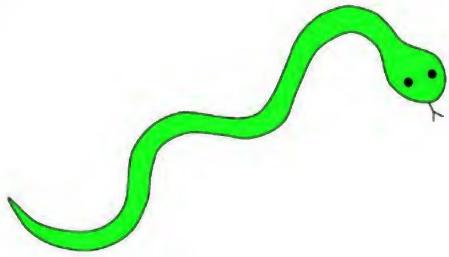
# Convention Against Torture- Withholding and Deferral

- ◎ **Acquiescence requirement** = defined in regs:  
Public officials have awareness + breach of legal responsibility to intervene – 8 C.F.R. sec. 1208.18(a)(7).

*However,*

all circuits except for the 1st and 11th have adopted the “willful blindness” standard.





## HYPOTHETICAL

1. R is a native and citizen of China, who hired a snakehead to smuggle him to the United States;
2. Before leaving China, R observed his smugglers communicating with Chinese officials;
3. While en route, the snakeheads beat and threatened him;
4. Once in the U.S., R provided identity info to the U.S. Government regarding the smugglers in cooperation w/ criminal investigation;
5. R was placed into removal proceedings. He claimed that if he were returned to China, he would be killed by the snakeheads;
6. R asserted that the local Chinese government officials work directly with the snakeheads and, thus, he would not receive protection from the government;
7. He also claimed the gov't would acquiesce in his torture.

# HYPOTHETICAL

## RECORD

- The Immigration Judge denied R's request for CAT, finding that
  - The evidence demonstrated that China was taking active measures to target human smugglers and to stop illegal departures by economic migrants;
  - Chinese government as a whole was working to combat human smuggling; and
  - R did not demonstrate that the Chinese government actually knew of and assented to the snakehead's torturous actions.

SHOULD THE BOARD AFFIRM?



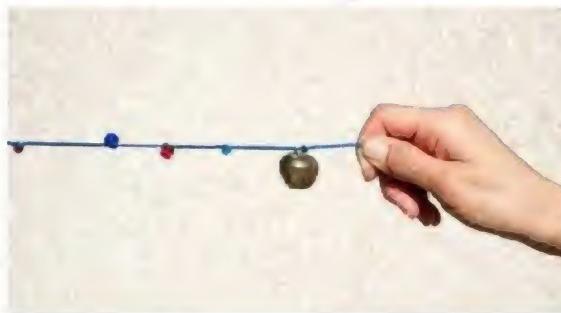


*See *Zheng v. Ashcroft*, 332 F.3d 1186 (9th Cir. 2003)*

- For a government official to “acquiesce” in acts of torture by private party, the government public official **need not have actual knowledge of**, or willfully accept, the torture.
- Government acquiescence does not require actual knowledge or willful acceptance of torture; **awareness and willful blindness will suffice**.
- In all Circuits—**except the 1<sup>st</sup> and 11<sup>th</sup>**—the correct inquiry is whether an alien can show that public officials demonstrate “willful blindness” to the torture of their citizens by third parties.

# Convention Against Torture- Withholding and Deferral

- Cannot establish likelihood of torture by stringing together **series of suppositions**
- Must show that **each link** in causal chain is **more likely than not to occur**



***Matter of J-F-F-***, 23 I&N Dec. 912 (A.G. 2006)

# Convention Against Torture- Withholding and Deferral

Too speculative chain of  
events – Example:

Medication  
needed for  
self-  
control

No access  
to medicine  
in home  
country

Will be  
“rowdy”  
w/o  
medicine

Will be  
arrested  
for acting  
out

Will be  
tortured  
in  
detention

*Matter of J-F-F-*, 23 I&N Dec. 912  
(A.G. 2006)

# Convention Against Torture- Withholding and Deferral

**CAT Deferral of removal—8 C.F.R. § 1208.17:**

- Likelihood of torture shown but applicant subject to bars in 241(b)(3)(B) that make applicant ineligible for CAT Withholding—see 8 C.F.R. § 1208.16(d)(2)



# Convention Against Torture- Withholding and Deferral

**CAT Deferral Differs from CAT Withholding in that:**

- IJ must give notice to alien of conditions of grant
- Continued detention possible following grant
- DHS may seek termination of grant at any time

8 C.F.R. 8 C.F.R. § 1208.17



# Burdens/Elements – Summary

- Asylum: R must show PP or WFF; reasonable person std.; If PP, then presume WFF unless rebutted; If rebutted, humanitarian asylum?
- Withholding: PP or “more likely than not” will be; If PP shown, then presume future harm unless rebutted
- CAT: “More likely than not” will be tortured; Deferral for those barred from WH



## SECTION III – BARS AND EXCEPTIONS TO ASYLUM/WITHHOLDING



# One-Year Bar for Asylum – INA § 208(a)(2)(B)



Applicant must show by **clear and convincing evidence** that he applied for asylum within year of arrival, or establish an exception.

Entry date may be contested

# Exceptions to One-Year Bar:

“**Changed Circumstances**”— in home country or based on activities in U.S.

**Note:**

Changed circumstances to overcome one-year bar (8 C.F.R. § 1208.4(a)(4))

≠

Changed country conditions to support MTR to apply/reapply for asylum (8 C.F.R. § 1003.2(c)(3)(ii)).



# Exceptions to One-Year Bar:

## “Extraordinary Circumstances”—

unaccompanied minor, ineffective assistance of counsel (or notario), serious illness or mental or physical disability, certain types of lawful status, etc.

- One-year exception is **not limited** to those listed in regulations

Note -- Must file within reasonable amount of time once exception established



# HYPO

R is a native and citizen of Iran who entered the United States 1 year before Khomeini came to power. A charging document was issued against him two years after the expiration of his student visa. He seeks asylum.

R fears persecution in Iran primarily because of an altercation he had 5 months ago with an agent of the Khomeini regime while he was at the Algerian Embassy in the United States. R contends that he is now known to Khomeini officials and that he therefore has good reason to fear persecution if returned to Iran. R also testified that he had participated in anti-Khomeini demonstrations in the United States.

# Questions:

- (1) Would you characterize these facts as indicative of changed personal circumstances or changed country conditions?
- (2) Would these facts serve to overcome the one-year bar? Why or why not?

***Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987)**

# Firm Resettlement Bar to Asylum

DHS has initial burden. ***Matter of A-G-G-***, 25 I&N Dec. 486 (BIA 2011); 8 C.F.R. § 1208.15(a) & (b)



# Firm Resettlement Bar to Asylum

## 4 Steps:

1. DHS has initial burden to make *prima facie* showing of offer of firm resettlement to R
2. R can rebut evidence of firm resettlement offer-- shows by POE that no such offer made or circumstances render him/her ineligible for permanent residence

*See Matter of A-G-G-, 25 I&N Dec. 486 (BIA 2011)*



# Firm Resettlement Bar to Asylum

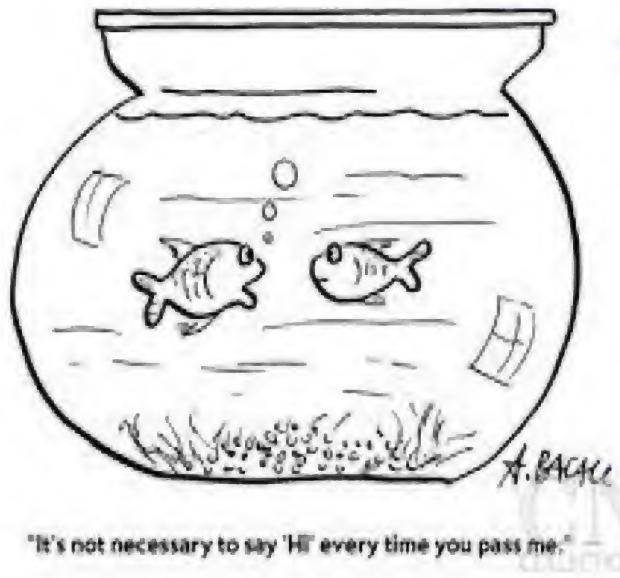
## 4 Steps:

3. IJ considers totality of evidence – determine if R rebutted DHS evidence of firm resettlement
4. If IJ determines R is firmly resettled, R's BOP to establish 1 of 2 exceptions by POE

See *Matter of A-G-G-*, 25 I&N Dec. 486 (BIA 2011)



## Exception #1



**"Necessary-consequence" exception –**  
**8 C.F.R. § 1208.15(a):**

- ❖ entry into that country was a necessary consequence of flight from persecution
- ❖ remained in that country only as long as was necessary to arrange onward travel
- ❖ did not establish significant ties in that country.

See *Ramos Lara v. Lynch*, 833 F.3d 556 (5th Cir. 2016);  
*Matter of D-X- & Y-Z-*, 25 I&N Dec. 664 (BIA 2012)

## Exception #2

“**Restrictive conditions**” exception –

8 C.F.R. § 1208.15(b):

That the conditions of his or her residence in that country were so substantially and consciously restricted by the authority of the country of refuge that he or she was not in fact resettled.

See *Matter of D-X- & Y-Z-*, 25 I&N Dec. 664 (BIA 2012);  
*cf. Camposeco-Montejo v. Ashcroft*, 384 F.3d 814 (9th Cir. 2004)



# Other Bars to Asylum

## Safe Third Country Agreement

INA § 208(a)(2)(A); 8 C.F.R. § 1240.11(g)—Canada



# Other Bars to Asylum

## Frivolous Asylum Claims—

- Notice required of consequences of knowingly filing a frivolous application for asylum under INA § 208(d)(6).
- Frivolous finding must relate to “material element” of claim
- ***Matter of Y-L-***, 24 I&N Dec. 151 (BIA 2007) (before making “frivolous” finding, IJ must give **opportunity to explain** deliberately fabricated information in asylum request).
- Frivolous finding doesn’t preclude seeking withholding of removal; 8 C.F.R. § 1208.20



# Other Bars to Asylum

## Previously Filed Asylum Application—

- Where applicant previously applied for and was denied asylum, unless changed circumstances exist which materially affect his/her eligibility for asylum. INA §§ 208(a)(2)(C)-(D); 8 C.F.R. § 1208.4(a)(3)-(4).
- Once there is a final order, applicant can only file a motion to reopen (MTR), and only under the “changed country conditions” if beyond 90-day MTR deadline.



# Other Bars to Asylum

## **Reinstated Removal Orders—**

Aliens with reinstated removal orders are ineligible to apply for any relief under the Act (including asylum). INA § 241(a)(5).

Under the regulations, however, these aliens may apply for withholding of removal. 8 C.F.R. § 208.31(e)

# Bars to Asylum and Withholding

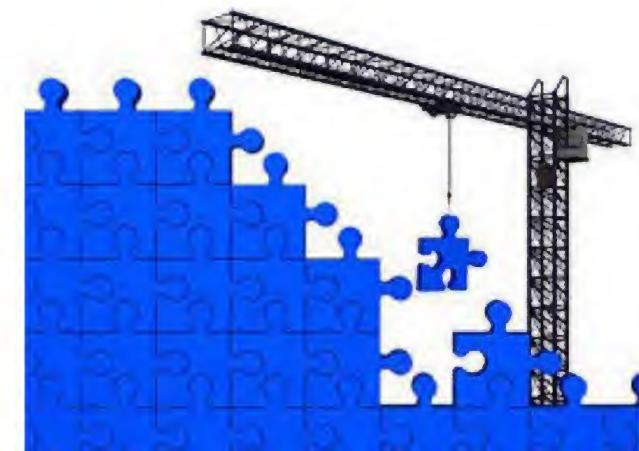
## Persecutor Bar—

- Ordered, incited, assisted or otherwise participated.
- Limited duress exception – ***Matter of Negusie v. Holder***, 27 I&N Dec. 347 (BIA 2018)—being reviewed by AG.



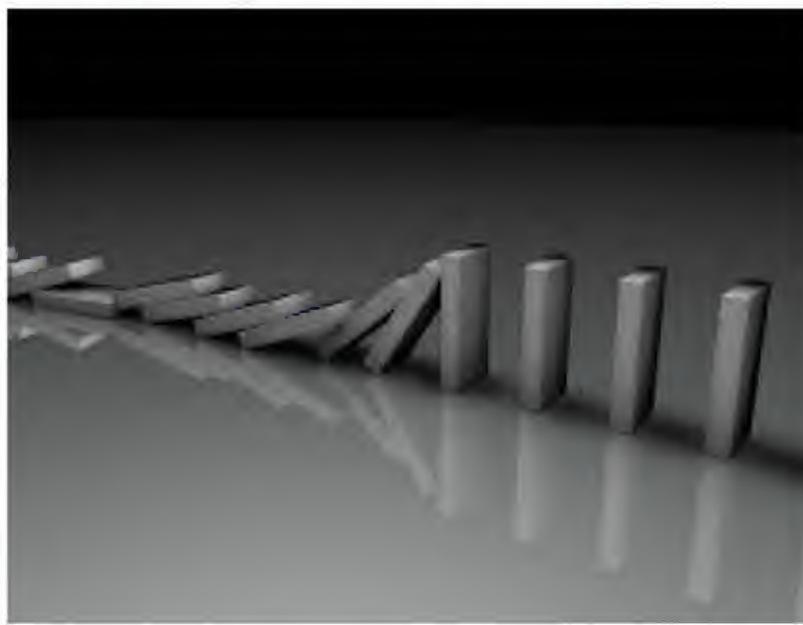
# Persecutor Bar – Framework for Analysis

1. Determine asylum/withholding eligibility
2. DHS has initial BOP – R assisted or otherwise participated in persecution – 2 Considerations:
  - Nexus btw R's role/acts/inaction & persecution
  - R's scienter/knowledge of persecution
3. If DHS BOP met, BOP shifts to R by POE that bar does not apply because:
  - R did not engage in persecution or
  - Acted under duress



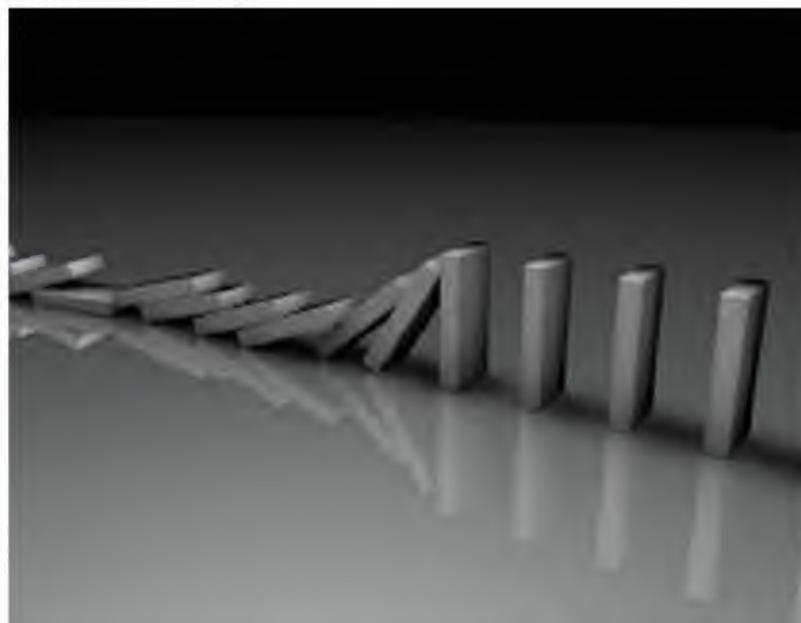
# If alleging duress, R must show 5 factors by a POE:

1. Acted under imminent threat of death or serious bodily injury to himself or others;
2. Reasonably believed threatened harm would be carried out unless he acted/refrained from acting
3. No reasonable opportunity to escape or frustrate threat;



## If alleging duress, R must show 5 factors by a POE:

4. Did not place himself in a situation knew or reasonably should have known would likely be forced to act or refrain from acting; and
5. knew or reasonably should have known harm inflicted not greater than threatened harm to himself or others.



# Bars to Asylum and Withholding

**Conviction of a “Particularly Serious Crime” bars asylum and withholding of removal**

- Requires a conviction
- Assessment may not be limited to record of conviction and focus is on the nature of the crime.
- ***Matter of N-A-M-***, 24 I&N Dec. 336 (BIA 2007)



# Bars to Asylum and Withholding

## Important cases relating to PSC bar:



- Drug-trafficking presumed “particularly serious.”
  - ***Matter of Y-L-, A-G- and R-S-R***, 23 I&N Dec. 270 (A.G. 2002)
  - Narrow exception for those only tangentially involved
- Mental health during crime **NOT** considered in assessing whether the conviction was for PSC. ***Matter of G-G-S-***, 26 I&N Dec. 339 (BIA 2014)



# Bars to Asylum and Withholding

## Aggravated Felony and the Particularly Serious Crime Bar—

- PSC bars both asylum and withholding
- However, Agg Fel Bar triggers PSC Bar *Differently for Asylum and Withholding.*

What's  
the  
DIFFERENCE

# Bars to Asylum and Withholding

## Aggravated Felony and the Particularly Serious Crime Bar—

- ◎ For Asylum- No asylum for Agg Fels b/c:

All agg fels = “particularly serious crimes.” INA § 208(b)(2)(B)(i) (those with PSCs are barred from asylum under 208(b)(2)(A)(ii))



# Bars to Asylum and Withholding

## Aggravated Felony/Particularly Serious Crime Bar

### For Withholding:

- Only agg fels where aggregate sentence of 5 years = per se “particularly serious crimes.” INA § 241(b)(3)(B)(iv).
- Agg Fels < 5 year aggregate sentence may still be “particularly serious crime” per regs and case law.

WHERE WILL  
YOU BE  
IN 5 YEARS?

# Hypo

R was convicted of possession of child pornography and served a 3-year sentence. He testified that he downloaded images and videos he knew involved children, explaining that he did so for personal use. R was not involved in the production, distribution, or commercialization of the materials, and his attorney argued that the children were already victimized by the time R downloaded the materials to his computer.

**Is he eligible for asylum or withholding?**

# Hypo

**Child Pornography = AF – 101(a)(43)(I)**

- Ineligible for asylum (per se PSC)
- Not per se PSC for purposes of WH because sentence < 5 yrs

**PSC—*Matter of R-A-M-*, 25 I&N Dec. 657 (BIA 2012)**

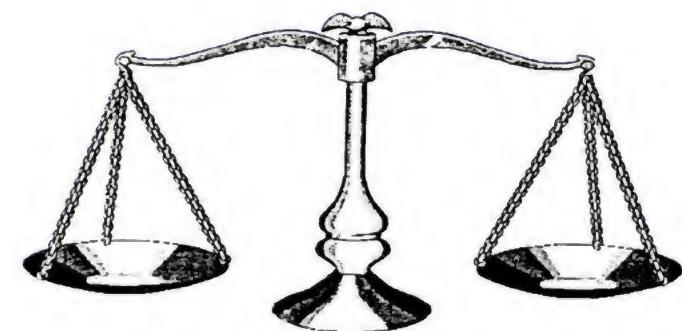
(Child Pornography = PSC)

- Children = vulnerable
- Children victimized during entire process (Child Pornography is a “continuing” crime)
- Possessing such materials “fuels the demand” for their production

# Bars to Asylum and Withholding

## Serious Non-Political Crime—

- ◎ Does not require a conviction
- ◎ If serious reasons to believe applicant committed serious non-political crime outside the U.S. before arriving in the U.S.
- ◎ Balance seriousness of criminal act against political aspect of conduct. ***Matter of E-A-***,  
26 I&N Dec. 1 (BIA 2012)



# Bars to Asylum and Withholding

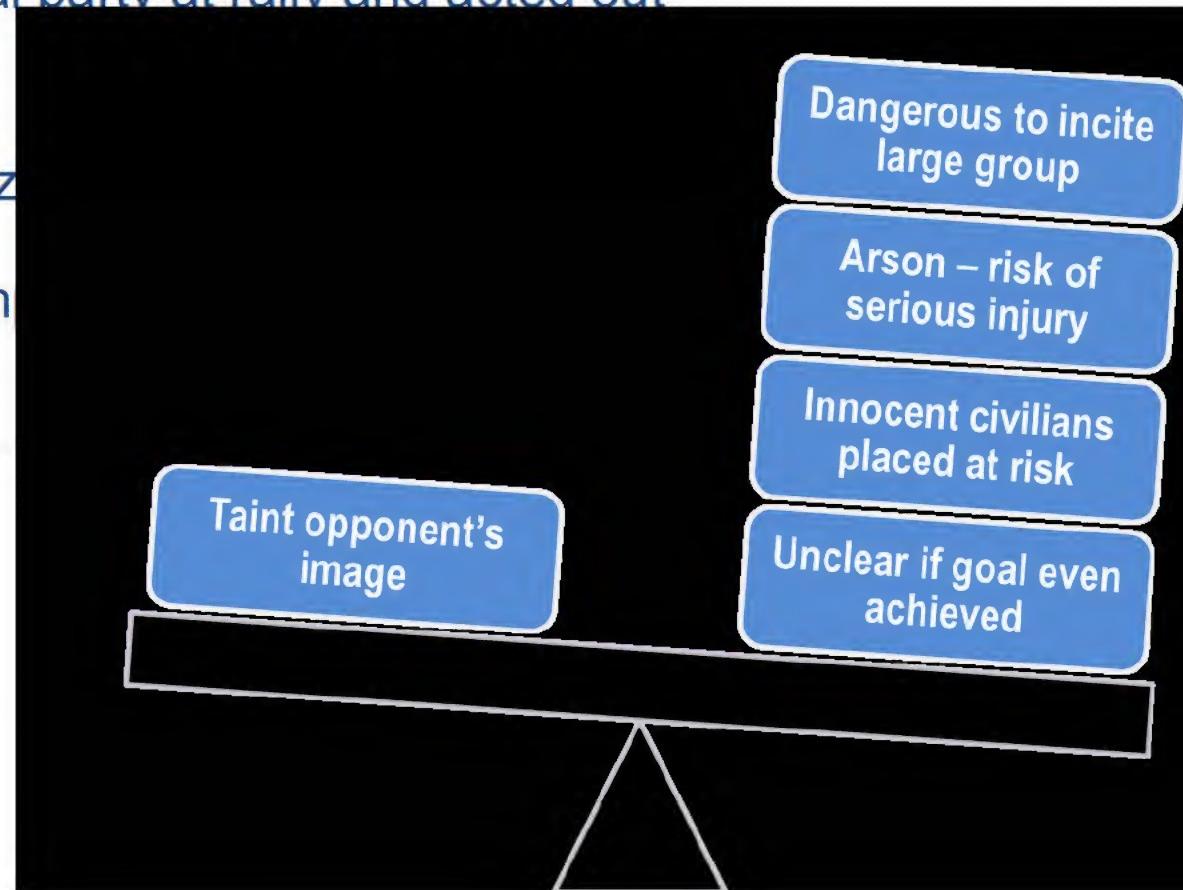
## Serious Non-Political Crime – Example:

Imitated opposing political party at rally and acted out violently

Set fire to buses, vandalize

Seriousness > political im

**Matter of E-A-,**  
26 I&N Dec. 1 (BIA 2012)



# Bars to Asylum and Withholding

## Security Threat –

Reasonable grounds to believe danger to security of the U.S.



# Bars to Asylum and Withholding

## Terrorist Bar—

- INA § 208(b)(2)(A)(v).
  - Membership in terrorist organization or engaged in terrorist activity (“material support” issue arises)
  - INA § 212(a)(3)(B)(iv)(VI) provides examples of material support: safe house, transportation, communications, funds/financial benefit, false docs/id, weapons, explosives, training



# Bars to Asylum and Withholding

Terrorist Bar—

**Trivial or De Minimus Support Can = Material Support**

*Matter of S-K-*, 23 I&N Dec. 936 (BIA 2006)

*Matter of A-C-M-*, 27 I&N Dec. 303 (BIA 2018)



# Bars to Asylum and Withholding

## Terrorist Bar—

**No Duress Exception—*Matter of M-H-Z-*, 26 I&N Dec. 757 (BIA 2016) (deciding issue of duress after issue remanded to Board—see *Ay v. Holder*, 743 F.3d 317 (2d Cir. 2014))**



# **“Material Support” Examples**

- (1) R saves \$500 every year and sends the money to a T/O in his home country.**
  
- (2) T/O members charged into R’s home, held R’s family at gunpoint, and slept at the residence for 2 nights.**
  
- (3) R’s co-worker, a known T/O member, invites R to his house for dinner. R accepts and, per social norm, gives bread and milk as a hosting gift.**

# **“Material Support” Examples**

- (4) **Observing a car on the side of a road, R provides the occupants—both of whom are wearing insignia of a well-known T/O— a free ride home.**
  
- (5) **Same fact as (4), except that R is a taxi driver and charges for the ride.**
  
- (6) **Same facts as (4), but instead of giving a ride, the occupants use R’s phone to call for help.**

# Possible Waiver for Terrorist Bar



- ◎ Only granted by DHS
- ◎ Only if alien is found “otherwise eligible” for asylum “but for” being barred for relief under § 212(d)(3)(B)
- ◎ Important for IJ and BIA to assess asylum and w/h eligibility and state that relief would be granted but for the terrorist bar

# Bars and Exceptions—Summary

- Asylum: 1-year bar, firm resettlement, safe third country, frivolous asylum claim, previously filed asylum app, reinstated removal order
- Asylum/WH: Persecutor, PSC, serious non-political crime, security threat, terrorist bar
- Agg Felony Bars Asylum. Period.
- Agg Felony Bars WH if sentence(s)  $\geq$  5 years OR if < 5 years, but conviction is considered “particularly serious”



## SECTION IV: “HOT TOPICS” IN ASYLUM, WITHHOLDING UNDER THE ACT & CAT



# Hypo #1 – Gang-based claims

- ❖ R recruited by gang but refused to join
- ❖ Convinced brother to leave gang
- ❖ Gang threatened R
- ❖ Beat him severely on one occasion
- ❖ PSG: “persons taking concrete steps to oppose gang membership and gang authority”

PSG established?



# Hypo #1 -- Gang-based claims

## Answer

*Matter of S-E-G-, 24 I&N Dec. 579 (BIA 2008);*

*Matter of E-A-G-, 24 I&N Dec. 591 (BIA 2008)*

- ❖ Rejection of gang recruitment efforts or those perceived to be affiliated with gangs ≠ PSG
- ❖ Reminder – cases prior to 2014 used term “social visibility” – which is now “social distinction”

# Hypo #1 -- Gang-based claims

## Answer

*Pirir-Boc v. Holder*, 750 F.3d 1077 (9th Cir. 2014)

- ❖ Held that the group (people opposed to gangs) was immutable
- ❖ Remanded-- the Board's decision did not adequately address social distinction of the proposed PSG.
- ❖ “[T]he BIA may not reject a group solely because it had previously found a similar group in a different society to lack social distinction or particularity.”

# Hypo #2 – Gang-based claims

- ❖ Tattoos indicate R is member of gang
- ❖ Fears persecution by rival gang
- ❖ PSG: current and former members of her particular street gang

PSG established?



# Hypo #2 -- Gang-based claims

## Answer

*Arteaga v. Mukasey*, 511 F.3d 940 (9th Cir. 2007)

- ❖ Held that *tattooed youths* was not sufficiently particular
- ❖ Persecution on account of shared past experiences (gang membership)-- not the type of characteristic that is protected under the asylum laws
- ❖ Recognizing the PSG would “pervert the manifest humanitarian purpose of the statute in question.”

# Hypo #3 – Gang-based claims

- ❖ R joined Mara Salvatrucha as child
- ❖ In U.S., quit gang and became born-again Christian
- ❖ Religious beliefs would prevent him from rejoining gang
- ❖ Sought WH, claims he will be killed for refusing to rejoin gang

PSG established?



# Hypo #3 – Gang-based claims

## Answer

**Ramos v. Holder, 589 F.3d 426 (7th Cir. 2009)**

- ❖ Voluntary membership in a criminal gang is not membership in a PSG.
- ❖ *But* former gang membership or an inability to resign without facing persecution can qualify as a PSG.

Noted there was no *per se* bar to asylum or withholding of removal for former gang members.

# Hypo #4 – Gang-based claims

- ❖ Father killed outside his evangelical Christian church
- ❖ Cousin, a witness of the murder, killed day before court hearing where she was scheduled to testify against gang members
- ❖ Sister threatened by gang members
- ❖ R fears persecution on account of religion and membership in his family that is opposed to local gangs.

Any protected ground(s) established?



# Hypo #4 – Gang-based claims

## Answer

*Rios v. Lynch, 807 F.3d. 1123 (9th Cir. 2015)*

- ❖ Religion– Evangelical faith
- ❖ Ninth Circuit upheld Board denial– no evidence of persecution on account of their faith



# Hypo #4 – Gang-based claims

## Answer

*Rios v. Lynch, 807 F.3d. 1123 (9th Cir. 2015)*

### PSG- Family

- ❖ Board erred in not addressing a withholding of removal claim that the applicant risks persecution by a gang because of its vendetta against his family
- ❖ Ninth Circuit noted “the family remains the quintessential particular social group” and noted that other circuits have found family to be a PSG



# Hypo 1 – Nexus

- ❖ R worked for state-run agency in Colombia that provided medical services.
- ❖ 1998-2004: R pressured to hire certain contractors outside of official approval process. When R refused, R transferred to another division.
- ❖ R continued to voice complaints re: corruption in hiring process. R started receiving threatening phone calls. Anonymous callers threatened to kill her if R did not leave country.



# Hypo – Nexus Answer

***Matter of N-M-, 25 I&N Dec. 526 (BIA 2011)***

- ❖ Identified a protected ground?
- ❖ Fear of persecution ***on account of*** that ground?

Post-REAL ID Act: Rs must show that protected ground was “one central reason” for the persecution.



## *Additional Immigration Resources:*

Executive Office For Immigration Review  
Law Library and Immigration Research Center  
Virtual Law Library (VLL)

(b) (7)(E)  